

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

Supreme Court, U. S.

FILED

JUL 21 1976

MICHAEL RODAK, JR., CLERK

No.

76 - 43

CITY OF PHILADELPHIA AND JOSEPHINE BROWN, Petitioners

AND

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC.

LOCAL R3-2, et al.,

Intervenors in D.C., Petitioners

v.

HONORABLE JAMES R. SCHLESINGER, Secretary of Defense,

and

HONORABLE MARTIN R. HOFFMANN, Secretary of the Army,

Respondents

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT**

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TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting Writ	5
Scope of Review	5
Conclusion	19
Certification	20

TABLE OF CITATIONS

Cases:

Alexander v. Gardner-Denver Co., 415 U.S. 36 1974 ..	10
Atlee v. Laird, 339 F. Supp. 1347 (E.D. Pa. 1972)	5
Baker v. Carr, 369 U.S. 186 (1962)	5, 6
Bela Seating Company v. Advance Transportation Co., 344 F. Supp. 854 (N.D. Ill., E.D. 1972)	5
Bell v. Hood, 327 U.S. 678 (1964)	5, 6
Conley v. Gibson, 355 U.S. 41 (1957)	10
Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967)	10
Eley v. Morris, 390 F. Supp. 913 (N.D. Ga. 1975)	5
Henderson v. Defense Contract Adm. Serv. Region, 370 F. Supp. 180 (S.D. N.Y. 1973)	8
Jemsura v. Beldon, 281 F. Supp. 200 (N.D. N.Y. 1968) ..	5
Knuth v. Erie-Crawford Dairy Corp. Assn., 395 F.2d 420 (3d Cir. 1968)	9, 10

TABLE OF CITATIONS—(Continued)

Cases:	Page
Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972) reversed sub. nom., O'Shea v. Littleton, 414 U.S. 488 (1974)	6
Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971)	5
Moody v. Albermarle Paper Company, 474 F.2d 134 (4th Cir. 1973)	11
Moore v. Ill. Central R. Co., 312 U.S. 630 (1911)	14
Richardson v. Civil Service Comm. of State of New York, 387 F. Supp. 1267 (S.D. N.Y. 1973)	5
Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972)	11, 13
Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965)	12
United States v. Cook, 432 F.2d 1093 (7th Cir. 1970) ..	14
United States v. Nixon, 418 U.S. 683 (1974)	11
Statutes:	
Arsenal Act., 10 U.S.C. §4532	10, 13, 14, 15, 18
Civil Rights Act of 1964, as amended, Title VII, 42 U.S.C. §2000, et seq	8, 10
Statutory Construction Act of Pennsylvania, 1937 May 28 P.L. 1019, 46 P.S. §551	15
United States Constitution, Art. I, §8, Clauses 1, 12, 14, 17	14, 18
Regulations:	
Executive Order No. 11478, August 9, 1969, 34 C.F.R. 12937	7, 8

TABLE OF CITATIONS—(Continued)

Cases:	Page
Other Authorities:	
16 Am. Jur. 2d §§144-147, §§150-151, <i>Constitutional Law</i>	14
34 P.L.E. Statutes §§123-128	15
Webster's Third Edition Unabridged English Dictionary Page 720	15, 16, 17
"How Much Is Enough", Alain C. Enthoven and (Harper Colophon 1971) K. Wayne Smith	17
The Permanent War Economy—American Capitalism in Decline, Seymour Melman—Simon & Schuster 1974)	17

APPENDIX

Motion for Preliminary Injunction	2A
Complaint of Petitioner-Plaintiffs	6A
Opinion and Order of the United States Court of Appeals	1B
Opinion and Order of the United States District Court..	1C

IN THE
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October Term, 1976

No.

City of Philadelphia and Josephine Brown, *Petitioners*

And

National Association of Government Employees, Inc.

Local R3-2, et al.,

Intervenors in D.C., Petitioners

v.

Honorable James R. Schlesinger, Secretary of Defense,

and

Honorable Martin R. Hoffmann, Secretary of the Army,
Respondents

**Petition for Writ of Certiorari to the United States
Court of Appeals for the Third Circuit**

TO THE CHIEF JUSTICES AND ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES:

The herein petitioners respectfully pray that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled matter on April 15, 1976.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit dated April 15, 1976, is officially reproduced in, and is printed in the Appendix hereto (App. 1B-7B). The opinion of the United States District Court for the Eastern District of Pennsylvania is officially represented in, and is printed in the appendix hereto (App. 1C-9C).

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 15, 1976, and is printed in the Appendix being the last line of the said Court's Opinion. The jurisdiction of this Court is invoked under 28 U.S.C. §1291.

QUESTIONS PRESENTED

1. Was it error for the court below to refuse a hearing on the merits so that petitioners could establish by evidence that respondents' closure of Frankford Arsenal was in bad faith, and part of a scheme to discriminate racially against a minority class?
2. Does petitioners' complaint aver sufficient charges of bad faith, impropriety and violations of statutory and constitutional mandates by respondents' arbitrary closure of Frankford Arsenal to afford a federal court jurisdiction to enjoin respondents, pending a factual adversary hearing on the merits relative to the economic operation of Frankford Arsenal?

STATEMENT OF THE CASE

On November 22, 1974, the Secretary of the Army announced the phased closure of Frankford Arsenal in Philadelphia, Pennsylvania. The closure of Frankford Arsenal will result in the transfer or elimination of 3,600 civilian jobs.

Petitioners brought an equity suit on May 16, 1975, and filed a motion for preliminary injunction averring impending irreparable harm as a result of respondents unlawful decision to close the Frankford Arsenal. It was alleged, *inter alia*, that the decision to close the Arsenal was not founded on a statutorily mandated economic basis and that the effect of the closure would engender a disproportionate racial impact on government employment opportunities for the facility's almost 600 non-white employees.

The thrust of petitioners' case is that the threatened closure is part of the Defense Department's plan to abolish the manufacturing and watchdog functions of the arsenal system in the United States. This system has historically provided skilled, civilian Arsenal personnel to monitor and supervise private armament contractors. The present closure decision is aimed at replacing that system with private contractors, less subject to the monitoring and supervisory influence of arsenal personnel. Petitioners also charge respondents with bad faith by way of conflicts of interest and other derelictions of duty.

In addition, petitioners alleged that the closure decision will result in racial discrimination as to the petitioner, Josephine Brown, a black, individually as a taxpayer and to the members of her class. Even though the petitioner, Josephine Brown, has been employed at the arsenal for more than 25 years, no promise of continued employment or other provisions (other than early retirement) have been planned by the Army for her and others like her. Presently, Arsenal facilities in Rock Island, Illinois are

accepting Frankford Arsenal transfers. However, the facility does not offer minority members the socio-economic advantages of the City of Philadelphia, nor is the proportion of minority population in that area as great as in Philadelphia. Therefore, the closure of the Frankford Arsenal will eliminate the government employment opportunity for a substantial number of minority citizens, while creating employment opportunity at another facility located in an area of the country where the proportionate number of non-whites is substantially and effectively fewer than in Philadelphia.

The District Court completely ignored the well-pleaded averments of discrimination and the absence of economic basis for the Secretary of the Army's decision to close the Frankford Arsenal and dismissed petitioners' complaint for lack of jurisdiction (App. 9C) on November 4, 1975.

On November 26, 1975, the petitioners filed an appeal to the United States Court of Appeals for the Third Circuit, which on April 15, 1976, affirmed, *per curiam*, the District Court's decision to deny petitioners an adversary hearing for an injunction.

REASONS FOR GRANTING THE WRIT

I. Scope of Review

THE ISSUES PRESENTED FOR REVIEW BEFORE THIS COURT CONCERN CONCLUSIONS OF FACT AND LAW MADE BY THE DISTRICT COURT WITH RESPECT TO ITS JURISDICTION OVER PETITIONERS' CLAIMS, AND SHOULD BE REVERSED UNLESS IT CLEARLY APPEARS THAT THE ALLEGED CLAIMS ARE IMMATERIAL, ARE MADE SOLELY FOR THE PURPOSE OF OBTAINING JURISDICTION, OR WHERE SUCH CLAIMS ARE WHOLLY INSUBSTANTIAL AND FRIVOLOUS.

The law is clear that a suit may be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such claim is wholly insubstantial and frivolous. *Bell v. Hood*, 327 U.S. 678, 683 (1964); *Mindes v. Seaman*, 453 F.2d 197, 198 (5th Cir. 1971); *Eley v. Morris*, 390 F. Supp. 913, 919 (N.D. Ga. 1975); *Richardson v. Civil Serv. Comm. of State of New York*, 387 F.Supp. 1267, 1271 (S.D. N.Y. 1973); *Atlee v. Laird*, 339 F.Supp. 1347, 1351 (E.D. Pa. 1972); *Bela Seating Company v. Advance Transportation Co.*, 344 F. Supp. 854, 855 (N.D. Ill., E.D. 1972); *Jemsura v. Beldon*, 281 F. Supp. 200, 205 (N.D. N.Y. 1968).

In *Baker v. Carr*, 369 U.S. 186, 199 (1962), the Supreme Court stated:

"Dismissal of [a] complaint upon the ground of lack of jurisdiction would be justified only if that claim were so attenuated and unsubstantial as to be absolutely devoid of merit."

Rather, for the Court to dismiss a suit for lack of jurisdiction, the cause of action alleged must be so patently without merit as to justify the court's dismissal for want of jurisdiction. *Bell v. Hood, supra.*; *Littleton v. Berbling*, 468 F.2d 389, 395 (7th Cir. 1972), *reversed* (on other grounds) *sub nom.*, *O'Shea v. Littleton*, 414 U.S. 488 (1974), *vacated sub nom.*, *Spomer v. Littleton*, 414 U.S. 514 (1974).

The court below affirmed not on the basis of the pleadings herein, but on statements by respondents not under oath. Respondents filed no answer, made no discovery; they simply supplied to the court as part of their brief, what they called an Addenda. From these the Circuit Court in its opinion accepted as Fact 111 alleged arsenal closings, transfer of arsenal employees, 24 million dollars in savings annually. Respondents not only did not plead these facts, they never disputed or denied any fact or informational averments in petitioners' complaint, which must be accepted as true, in considering respondents' motion to dismiss. This is precisely the nub of the suit herein. Respondents claim *sub rosa* that the arsenal closing will save money. That saving, if any, is only one factor in an inquiry as to the economic basis of operating Frankford Arsenal. Were petitioners given their day in court for adversary hearing, they have ready and can produce massive evidence to support their theory that the proposed Arsenal closing is without economical basis, but rather a planned scheme by the Army to dominate the United States economy in substitution of the Congress and our society. Thus, this Court has jurisdiction and petitioners have stated a cause of action.

A. Petitioners Have Presented a Cause of Racial Discrimination When the Subject Matter Alleged Demonstrates That the Contemplated Closing of the Frank-

ford Arsenal Engenders a Disproportionate Discriminatory Racial Impact Upon Minority Arsenal Employees.

In their complaint for injunctive relief and declaratory judgment, the petitioners alleged that the phased closing of the Frankford Arsenal would cause a serious impact on minority employment opportunities in the Philadelphia area (App. 7A) and that the transfers contemplated by the Army in the wake of the Arsenal closing would effect a racially discriminatory impact (App. 8-9A).

In support of the claims, petitioners alleged that Secretary of the Army's decision to close the Arsenal violated the statutory mandate of the Civil Rights Act of 1964, as amended, and Presidential Executive Order No. 11478 implementing 42 U.S.C. §2000e. (App. 6A).

Section 2000e-16 of the Civil Rights Act provides:

"(a) All personnel actions affecting employees or applicants for employment . . . in military departments as defined in Section 102 of Title 5, in executive agencies . . . as defined in Section 105 of Title 5 . . . shall be free from any discrimination based on race, color, religion, sex or national origin . . .

"(e) Nothing contained in this Act shall relieve any Government agency or *official* of its or *his* primary responsibility to assure non-discrimination in employment as required by the Constitution and statutes or of its or *his* responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government." [emphasis added]

Executive Order 11478, August 9, 1969, 34 C.F.R. 12937 provides:

"Section 1. It is the policy of the Government of the United States to provide equal opportunity in Federal

employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

"Section 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner. . .

"Section 6. This Order applies (a) to military departments as defined in section 102 of title 5 United States Code, 5 U.S.C.A. §102."

Although §2000e-16 was not included in the original enactment of the Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e et seq.¹ the right of federal employees to be free from the effects of employment discrimination was recognized when Congress enacted amendments to Title VII in March of 1972.² *Henderson v. Defense Contract Administration Services Region*, 370 F. Supp. 180 (S.D. N.Y. 1973).

1. Pub. L. 88-352, Title VII, §701, July 2, 1964, 78 Stat. 253.

2. Pub. L. 92-261, §11, March 24, 1972, 86 Stat. 111.

In support of the claim that the closing of the Frankford Arsenal would engender a disproportionate racial impact on the minority employees working at the Arsenal, petitioners alleged statistical data which clearly indicated the discriminatory impact of the planned abolition of the arsenal.

It was alleged that the majority of job transfers (approximately 1,239) are to the Army's Rock Island, Illinois facility. The statistical data demonstrated the following:

(1) Total Philadelphia SMSA (Standard Metropolitan Statistical Area) Population	5,000,000 (Est.)
(2) Total Philadelphia SMSA Minority Population	845,000 or 18%
(3) Total Rock Island, Illinois SMSA Population	365,000 (Est.)
(4) Total Rock Island SMSA Minority Population	13,000 (Est.) or 3.7%
(5) Present minority employment at Frankford Arsenal	589 or 17% of Total Frankford Arsenal employment;
(6) Present minority employment at Rock Island facility	450 (Est.) ³ or 6% of total employment

(App. 12a-14a)

Despite all of the above allegations, the District Court herein granted respondent's motion to dismiss for lack of jurisdiction. On a motion to dismiss, the court must accept as true all material allegations of the complaint, *Knuth v.*

3. The Army has refused to supply exact statistical data concerning the actual number of non-white employees at the various facilities accepting transfers. However, if the decision of the District Court herein is reversed and remanded for trial on the merits, the plaintiffs could obtain needed information by discovery.

Erie-Crawford Dairy Corp. Assn., 395 F.2d 420, 423 (3d Cir. 1968); *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484, 486 (5th Cir. 1967). In appraising the sufficiency of any complaint, it is axiomatic that it should not be dismissed unless it appears, beyond doubt, that a plaintiff can prove no set of facts in support to his claims which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957).

Instead, the District Court herein decided that the closing of a military arsenal did not constitute "personnel action" within the meaning of the Civil Rights Act, 42 U.S.C. §2000e-16(2). (A.52a). The District Court ventured this opinion based on its determination that the Secretary of the Army had *unqualified authority* over such installations.⁴

There is no question that such an interpretation of the phrase "personnel actions" completely repudiates the express purpose of the Civil Rights Act and its amendments; to eliminate those practices and devices that discriminate on the basis of *race, color, religion, sex or national origin*. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The District Court's analysis herein defies logic and flies in face of established legal precedent. Nowhere can it be found that the Secretary of the Army may ignore the Civil Rights Acts and Executive Order No. 11478 which expressly state that it is the *primary responsibility*⁵ of all officials to provide equal employment opportunity. The

4. This decision was based on the erroneous assumption that 10 U.S.C. §4532(b) granted untrammeled discretion to the Secretary of the Army to abolish any arsenal in the United States despite the preceding paragraph (a) requiring an economic basis for closure of arsenals. See, Argument part B, *infra*.

5. 42 U.S.C. §2000e-16(e) and Executive Order No. 11478, Section 2.

Furthermore, Congress in enacting this section, intended to provide for federal employees the same right to judicial review of discrimination as provided private employees. *Henderson, supra*.

Secretary of the Army's authority and control of United States arsenals cannot be beyond the power of the federal courts to enjoin illegal conduct and to command compliance with the law. See, *United States v. Nixon*, 418 U.S. 683 (1974).

Although the reasons behind the Secretary's decision to close the Frankford Arsenal may be lawful, the petitioners are erroneously being denied an opportunity to prove their case. The petitioners have alleged sufficient facts to demonstrate that the closure of the Frankford Arsenal will result in a loss of equal employment for the minority employees of the Frankford Arsenal and will cause an adverse racial impact on minority personnel who may desire transfer. As the Supreme Court has stated:

"The Act [42 U.S.C. §2000e et seq.] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)."⁶

The petitioners have clearly demonstrated that the closing of the Frankford Arsenal will have a differential racial impact. Therefore, the Government should be put to the test of proving that their action in closing the arsenal was motivated by business necessity. See *Moody v. Albemarle Paper Company*, 474 F.2d 134 (4th Cir. 1973).

By interpreting Section 2000e-16 in such a manner as to place the Secretary of Army's action beyond the jurisdictional power of the federal courts, the District

6. See also, *Rowe v. General Motors Corporation*, 457 F.2d 348, 354 (5th Cir. 1972) where the Court stated "the only justification for standards and procedures which may, even inadvertently, eliminate or prejudice minority group employees is that such standards or procedures arise from a non-discriminatory business necessity."

However, *here* respondents do not even have to prove business necessity, since petitioners are precluded from making a case!

Court has departed from established legal concepts. See, *Nixon, supra*. Furthermore, the Army is not closing the Frankford Arsenal in the sense that the Army is terminating its business; rather the Army is transferring to other facilities (*i.e.* Rock Island, Ill. and private enterprise) the activities performed by the Frankford Arsenal.

By analogy, the Supreme Court has held that an employer may terminate his entire business for any reason he pleases, but such right does not include the ability to close part of a business no matter what the reason. *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965). In *Darlington*, an employer attempted to circumvent the purposes of the National Labor Relations Act, 29 U.S.C. §158, by closing down part of his business operations in one area of the country where union organizing activity was occurring, while maintaining part of his business in another area where he was free from union interference. The Supreme Court reversed the Court of Appeals and affirmed the decision of the Labor Board by holding:

"Thus it is not questioned in this case that an employer has the right to terminate his business, whatever the impact of such action on concerted activities, if the decision to close is motivated by other than discriminating reasons." 380 U.S. 269. [emphasis added]

Just as one of the purposes of the National Labor Relations Act was to prohibit the discriminatory use of economic weapons to destroy a union, 380 U.S. 271, the purpose behind the Civil Rights Act, and more particularly §2000e-16, was to eliminate discriminatory employment practices in government, *Henderson, supra*.

Therefore, when a cause alleges that the purpose of the Secretary of Army in closing the Frankford Arsenal is not motivated by economic necessity, and that such closing will result in an adverse racial impact on minority employment opportunity at that facility then it is *imperative* that

the federal court grant jurisdiction and give the petitioners herein their "day in court" to prove their allegations.

Moreover, the Civil Rights Act, unlike the National Labor Relations Act, does not require intentional misconduct or discrimination before the federal courts may act. In employment discrimination cases, the federal courts are empowered under the Civil Rights Act to enjoin conduct which, even inadvertently, discriminates. *Rowe, supra*.

B. Petitioner's Complaint Does Allege Sufficient Jurisdiction From Which a Court Could Reasonably Infer Impropriety and Violations of Statutory and Constitutional Mandates, Which Would Afford the Federal Court the Power and Duty to Enjoin the Unauthorized, Unjustified Closing of the Frankford Arsenal Pending a Factual Adversary Hearing Before the Court as to the Economic Basis of the Arsenal Operation and Bad Faith of Respondents.

Petitioners' complaint avers many issues of fact which require petitioners to have their day in court to proffer evidence that respondents, individually, have violated the Arsenal Act; have a conflict of interest in their official capacity; intend to eliminate this country's prime security guard for military and defense safety of the nation; and that the Frankford Arsenal operated on an economical basis.

1. The Arsenal Act, 10 U.S.C. §4532 reads:

"Factories and Arsenals: Manufacture at; abolition of

- (a) The Secretary of the Army shall have supplies needed for the Department of the Army made in factories or arsenals owned by the United States, so far as those factories or arsenals can make those supplies on an economical basis.
- (b) the Secretary may abolish any United States Arsenal that he considers unnecessary. Aug. 10, 1956, c. 1041, 70A Stat. 254."

The words "*Shall*" in section (a), and "*May*" in section (b) in the Code must be read to effect the validity of the Arsenal Act, by showing the harmonious relation between these two sections. That is, both are essential to operation of the Act. First, to justify abolition of an arsenal, it must be established that an arsenal is not being operated on an "*economical basis*", before the Secretary of the Army can exercise his discretion, to abolish, as evidenced by "*May*" in the Act. [Section (b)].

Our authority is 16 Am. Jur. 2d *Constitutional Law*, Sections 144, 145, 146, 147, 150, 151. The latter section, 151, pp. 356-359, deals with the judicial technique for the determination of the validity of a statute, which may appear ambiguous. The text states that the eyes of the court are never limited to the mere letter of the law, but that they may look behind the letter to determine the true purpose and effect.

Among the cases cited in 16 Am. Jur. 2d, *supra*, are: *United States v. Cook*, (7th Cir. 1970), 432 F.2d 1093, 1098; and *Moore v. Ill. Central R. Co.*, 312 U.S. 630-636, 85 L. Ed. 1059 (1911). Both cases involve regulations or acts which employ word "*shall*" and "*may*".

It is the opinion of the writer in the instant case that the Arsenal Act offers no real ambiguity; instead the order of the words "*shall*" and "*may*" show beyond question that under the U.S. Constitutional Mandate of Article I, Section 8, Clauses 1, 12 and 17, Congress required the United States Secretary of the Army to set up and maintain, *first inter alia*, defensive military supplies, factories—arsenals such as Frankford Arsenal, and the Secretary is "required to" retain them as long as they operate on an *economical basis*, secondly, the Secretary *may* at his discretion, if the *economical basis* is not operative, abolish such arsenal that he considers unnecessary. The Secretary's discretion cannot be arbitrary. To permit that is to disregard the mandatory, directory character of "*shall*" in the Section (a) of the Arsenal Act.

In accord with petitioners' analysis of the Arsenal Act are the general rules for the Construction of Statutes, as set forth in the Statutory Construction Act of Pennsylvania, 46 P.S. §§551, 552, 1937; May 28. P.L. 1019, article IV, §51, §52. See also 34 P.L.E. *Statutes* §§123-128, on Construction To Effect Legislative Purpose, at 430.

It is always presumed that a statute was intended to have the most reasonable and beneficial operation that its language permits. A purpose to disregard sound public policy must not be imputed to a legislature except upon the most cogent and clear evidence. However, the function of the courts in this regard is solely that of interpretation.

Plain and unambiguous words may not be disregarded—§128, 36 P.L.E., *supra*. "*Shall*" and "*May*" are plain, unambiguous terms. Therefore, they must be both used harmoniously to effect application of the Arsenal Act, 10 U.S.C. §4532.

It follows that the significance of "*economical basis*" must be determined, by evidentiary means; which the petitioners intend to supply factually at the trial of this suit.

Economics is not a science like physics or chemistry, or mathematics; its meaning is not exactly nor precisely clear. Many definitions have been applied to "economic" "economy", "economical", as reported in dictionaries—law and general—as well as in many textbooks. What is common to these definitions is their circuitry of thought, their variety in application, and the number of disagreements among text writers and economists as to the meaning of the terms involved herein.

For example, "economics" and "economy" are thus treated in Webster's Third Edition Unabridged English Dictionary:

"ec-o-nom-ic/ . . . also ec-o-nom-i-cal . . . adj. [economic
fr. LL *oeconomicus* of or relating to a divine dispensation. fr. LGK *oikonomikos*, fr. Gk, skilled in the management of a household, frugal, fr. *oikonomos* steward

& -ikos -ic; *economical* fr. LL *oeconomicus* & E -al —more at ECONOMY] 1 *usu economical, archaic*: of or relating to a household or its management: of or relating to a divine dispensation or system of government 2 *usu economical*: given to thrift (a sturdy, handsome, high-colored woman . . . *economical* and sensible — Carl Van Doren): productive of saving (sea power is the . . . most *economical* form of military power—*Time*): sparing in quantit (as of words) (a style as *economical* and exact as a theorem in geometry — Richard Harrity)

"3.a: of or relating to the science of economics (rejected the doctrines of Ricardo): of, relating to, or concerned with the production, distribution, and consumption of commodities (a program to prevent inflation and collapse) (a council of advisers): MATERIAL (moved exclusively by motives) b: having practical or industrial significance, uses or application (the plants of a region): affecting or liable to affect material resources or welfare (two — pests were intercepted by . . . inspectors during recent weeks — *Farm Chemicals*) c: operated or produced on a profitable basis: producing an excess of returns over expenditures (reactor types which might be developed to produce — power—U.S. Code): capable of or liable to profitable exploitation (beds of phosphate are found only under marine conditions — A.M. Bateman): PROFITABLE (barely — since she paid a nurse almost as much as she made herself — Elizabeth Janeway) syn see sparing."

Vol. 14, *Words and Phrases*, pp. 114 to 118 and pocket part 1974, pp. 17-21 inclusive, also pursue definition for the meaning of "economic concept, through the phrases "economic", "economical", "economically attributed to the wife", "economic benefit", "economic burden", "economic control", "economic gain", "economic interest", "economic

need", "economic obsolescence", "economic relationship", "economic value", "economic adulteration", "economically significant section of country", "economic appraisal to value", "economic benefit or cash value", "economic duress", "economic hardship", "economic income", "economic loss", "economic power", "economic reality", "economic reasons", "economic rental", "economic strike", "economic unity", "economic waste."

Examination of the above cited terms, their definitions and legal references leave the student, the lawyer, or the inquirer, with no clear notion of the meaning of the term "economic" and its allied words and language. Yet, *the economical* is an all pervasive influence in the lives of everyone. Inquiry into the means and application of this topic and its meaning to the City of Philadelphia, Josephine Brown, the respondents, as mandated by Congress, must be sought in the facts to be adduced by petitioners in the trial of this cause.

The crisis issue is not merely a matter of saving money for our defense, but the economic damage this country has suffered and will continue to do so, because of the uneconomic behaviour of our Defense Department in the Pentagon since 1960. One authority is "*How much is Enough?*" (1971) by K. Wayne Smith (Harper (Colophon)); another is Seymour Melman, whose most recent publication is "*The Permanent War Economy, American Capitalism In Decline*". (Simon and Schuster (1974), in which the author shows that our modern defense system, far from ensuring prosperity, has in fact drained American industry of its initiative, its ability to produce profit and its competitive spirit. Tracing the history of our belief that a "War economy" produces prosperity, Melman shows how the enormous and wasteful investments in defense spending has led to America's decline as an industrial power and to the stagnation of the once powerful American economy. He analyzes the great defense schemes that have cost billions and delivered little, and shows just what

effects those disastrous programs have had on our national life and culture. He demonstrates how defense spending has led us to ignore the areas of capital investment that would, in fact, renew our failing economy, and how our war economy has contributed to inflation.

In light of the foregoing which makes clear our economic dangers engendered by the Pentagon's flouting of the U.S. Constitution, Article I, Section 8, Clauses 1, 12, 14, 17; The Arsenal Act, 10 U.S.C. §4532, under which Congress exercised its power to erect and maintain arsenals, and likewise, violating the congressional order to maintain economically-based arsenals, while the Defense Department's prime officials enjoyed their conflicts of interest, and ignored their duties during their Pentagon officialdom, it seems that petitioners have presented adequate grounds for the Court's jurisdiction as well as stated a substantial cause of action, under oath, and involving a most serious issue affecting the economic safety of this country. Verbal abstractions, like "Arsenal", "jurisdiction", "standing", "cause of action", and so on fail to pinpoint clearly the issues involved here, in the absence of concrete evidence of Respondents' wrongs, which petitioners are prepared to show on their day in court in an adversary contest.

This Court has the common law jurisdiction to right the grievous wrong done to petitioners by the respondents.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that the Petition for Certiorari should be granted.

Respectfully submitted,

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Assistant City Solicitor
Attorney for Petitioners

CERTIFICATION

I, Louis F. Hinman, III, Assistant City Solicitor, Attorney for appellants in the Case of *City of Philadelphia, et al v. Schlesinger, et al*, do hereby certify that copies of petitioners' Petition for Certiorari were mailed to Arnold Anderson Vickery, Assistant to General Counsel, at his office in Washington, D.C., and other counsel of record, by mailing same by first class mail, postage prepaid on July 13, 1976.

Louis F. Hinman, III

1A

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

No. 75-1405

Civil Action

CITY OF PHILADELPHIA
15th Floor
Municipal Services Bldg.
Philadelphia, Pa.

and

JOSEPHINE BROWN
5751 N. 20th Street
Philadelphia, Pa.
Plaintiffs

v.

JAMES R. SCHLESINGER
Secretary of Defense, et al
Room 3E718, The Pentagon
Washington, D. C. 20310

and

MARTIN R. HOFFMANN
Secretary of the Army
Room 3E718, The Pentagon
Washington, D.C. 20310
Defendants

Motion for Preliminary Injunction

Upon the verified Complaint and the Affidavit of the Plaintiff, City of Philadelphia, which is annexed hereto, plaintiffs move the Court as follows:

1. To issue a Preliminary Injunction enjoining the defendants, JAMES R. SCHLESINGER, Secretary of Defense and HOWARD H. CALLAWAY, Secretary of the Army, their successors, agents, officers and all other acting under their supervision and control, from proceeding with, causing, or ordering the closing and/or abolition of the Frankford Arsenal, Philadelphia, Pennsylvania, or the transfer or relocation of facilities located at the Frankford Arsenal, or the transfer or elimination of jobs held by the plaintiffs and persons similarly situated in connection with a proposed closure of Frankford Arsenal on the grounds that:
 - (a) Such action by defendants is in violation of Title 10 U.S.C. §4532, August 10, 1956, C.1041-70A Statute 254, known as The Arsenal Statute, and Executive Order 11478 dated August 8, 1969.
 - (b) Unless restrained by this Court, defendants will continue to perform the acts referred to, in violation of the law.
 - (c) Such action, if continued by defendants, will result in irreparable harm, loss and damage in that the individual taxpayer plaintiff will suffer loss of employment, and taxpayers will bear the cost of the contemplated illegal and uneconomic closing of the Arsenal.
 - (d) Such action, if continued by the defendants, will result in irreparable harm, loss and damage to the City of Philadelphia, plaintiff, in that the City of Philadelphia will suffer loss of tax income, and the attendant economic harm to the commerce and general welfare of the community.

(e) The issuance of a Preliminary Injunction herein will not cause inconvenience or loss to the defendants, but will prevent irreparable harm and injury to the plaintiffs, and will prevent further violation by the defendants of the law, to wit, Title 10 U.S.C. §4532, known as the Arsenal Statute.

2. To grant the plaintiffs such other relief under the circumstances as is just and reasonable.

Respectfully submitted,

Joseph R. Lally
Assistant City Solicitor

Stephen Arinson
Chief Deputy City Solicitor

Sheldon L. Albert
City Solicitor
Attorneys for City of Philadelphia

(Caption Omitted in Printing)

Affidavit

Commonwealth of Pennsylvania

ss.

County of Philadelphia

The undersigned, Harry R. Belinger, in the within action being duly sworn according to law, deposes and says that:

1. He is City Representative and Director of Commerce for the City of Philadelphia, with authority to execute this affidavit and with knowledge of matters herein stated.

2. Defendants' action in proceeding with the closure of the Frankford Arsenal will cause severe hardship to the minority as well as other employees at the Arsenal and will further aggravate the present minority unemployment situation in this urban area.

3. This is an action to enjoin the defendants from closing the Federal installation known as Frankford Arsenal in violation of Title 10 U.S.C. §4532(a), which provides that the Secretary of the Army shall have supplies needed for the Department of the Army made in factories or arsenals owned by the United States, so far as those factories or arsenals can make those supplies on an economical basis.

4. The action to close Frankford Arsenal is now beyond the proposal stage. It is present and continuing, and actually proceeding according to a timetable plan for closure, formulated by the defendants, and their respective departments and subordinates.

5. Included in and a necessary part of the closure of Frankford Arsenal is the elimination of 3,500 jobs now held by the individual plaintiff and all other employees of Frankford Arsenal.

6. Defendants, through their agents and subordinates are preparing and are about to distribute notices to federal civilian employees at Frankford Arsenal, advising them of the termination of their employment or the transfer of their positions to other facilities not in the Philadelphia area.

7. Such action, if continued by the defendants will result in irreparable harm, loss and damage to the City of Philadelphia, plaintiff, in that, aside from the racially discriminatory impact of the closing, it will also result in a loss of commerce, and a loss of tax income and attendant economic harm to the City generally.

8. Unless the defendants are enjoined and restrained during the pendency of this action from proceeding as above, the closure of the Frankford Arsenal will progress to such a point that, by the time this litigation is terminated, the defendants will have accomplished the closure of the Frankford Arsenal, even though the same is being accomplished contrary to law.

Harry R. Belinger

Sworn to and Subscribed
before me this day
of , 1975

(Caption Omitted in Printing)

Complaint for Injunctive Relief and Declaratory Judgment and in the Nature of Mandamus

1. Jurisdiction

A. Plaintiffs institute these proceedings and invoke the original jurisdiction of this Court under:

- (1) 28 U.S.C., Sections 1331, 1361, 2201 and 2202 and 5 U.S.C. Sections 701-706;
- (2) 42 U.S.C. §1981;
- (3) Executive Order 11478, Dated August 9, 1969;
- (4) Article I, Section 8 of the U.S. Constitution;
- (5) The Law of August 10, 1956, C.1041, 70 A. Stat. 254, 10 U.S.C.A. §4532, known as The Arsenal Statute.

2. Plaintiff

A. The plaintiff, City of Philadelphia, is a municipal corporation, a City of the first class of the Commonwealth of Pennsylvania, wherein is located the Frankford Arsenal.

B. Plaintiff, Josephine Brown, is a resident of the City of Philadelphia, residing at 5751 North 20th Street, a black civilian employee of the Frankford Arsenal, a taxpayer paying income taxes and other federal taxes to the United States Government, and a taxpayer paying wage and property taxes to the City of Philadelphia.

C. All others who are similarly situated and desire to join in this action.

3. Defendants

A. The Defendant, James R. Schlesinger, is Secretary of the Department of Defense.

B. The defendant, Howard H. Callaway, is Secretary of the U. S. Department of the Army.

C. The acts herein complained of are within the responsibilities of the defendants and their duly authorized representatives, agents and employees.

4. Basis of the Action

(a) The Frankford Arsenal, located in Philadelphia, Pennsylvania, is a Federal installation, under the jurisdiction and authority of the Department of Defense, and is operated by the Department of the Army, Munitions Command, and employs approximately 3,500 civilian employees, whose combined annual salaries total approximately \$57,000,000.00. These civilian employees are payers of wage taxes to the City of Philadelphia, and the majority of these employees are residents of the City of Philadelphia, subject to the other City taxes, including property taxes.

(b) On November 22, 1974, the defendants announced the intention of the Department of the Army to close and abolish the Frankford Arsenal. The effective closing of the base would be completed prior to June 30, 1978. As part of the announced closing, certain positions are to be transferred to other Army facilities. Of the total of approximately 3,500 employees to be effected by the closing, approximately 1,600 of their positions are to be transferred. The remaining employees' positions are to be abolished. The majority of the job transfers (1,239) are to the Army's Rock Island, Illinois facility.

COUNT I

(a) This Count is being brought by the City of Philadelphia *parens patriae* with a public property right to collect and receive taxes due it from and by the plaintiff, Josephine Brown, to enjoin the defendants from continu-

ing to implement a planned, unauthorized, unlawful, Congressionally unsanctioned abolition of the Frankford Arsenal under said Arsenal Statute, and for declaratory judgment relief.

(b) The planned abolition of the Arsenal is in violation of Presidential Executive Order No. 11478, implementing 42 U.S.C. §2000(e), in that the planned abolition and transfers will and must effect a racially discriminatory impact on the present minority employees and will seriously impair the ability of the Federal Government to meet its obligation to provide equal employment opportunities in accordance with the above referenced Presidential Order.

Under the terms of Executive Order No. 11478, government agencies, including the U.S. Army are charged with the duty to "promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency." The Executive Order further mandates that "[T]his policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practices . . ."

The following statistics clearly indicate the discriminatory impact on the planned abolition:

(1) Total Philadelphia SMSA (Standard Metropolitan Statistical Area) Population	5,000,000 (Est.);
(2) Total Philadelphia SMSA Minority Population	845,000 or 18% ;
(3) Total Rock Island, Illinois SMSA Population	365,000 (Est.);
(4) Total Rock Island SMSA Minority Population	13,000 (Est.) or 3.7%
(5) Present minority employment at Frankford Arsenal	589 or 17% of Total Frankford Arsenal employment;
(6) Present minority employment at Rock Island facility	450 (Est.) or 6% of total employment.

In the planned abolition of the Frankford Arsenal, defendants have failed to consider the impact on minority employment in violation of Executive Order No. 11478. The discriminatory impact is further aggravated by the fact that, aside from the positions that are abolished, most of the personnel to be transferred will be unable, as a practical matter, to accept the planned transfers. It is estimated that, based on past experience, the percentage of actual personnel transfers will be approximately 5%.

Plaintiffs believe and therefore aver that unless the defendants are restrained from continuing to implement the planned abolition, there will be a serious impact on minority employment opportunities in this area, and a great many of the existing minority employees at the Frankford Arsenal will be subjected to a prolonged period of unemployment.

Plaintiffs believe and therefore aver that the defendants have failed to consider the mandate of Executive Order No. 11478 to promote equal employment opportunities and have failed to implement the Executive Order's mandate to consider that policy as an "integral part of every aspect of personnel policy."

COUNT II

Plaintiff, City of Philadelphia, as the governing civil agency of its 2,000,000 citizens, among them the 3,500 Frankford Arsenal employees, as *parens patriae*, aver that the threatened action by defendants will result in injury to the economy and prosperity of the City of Philadelphia, including a diminution of taxes and a general curtailment of the City's commerce. Plaintiff believes and therefore avers that the threatened closing of the Frankford Arsenal is part and parcel of a conscious plan to unlawfully evade and ignore the command and law set forth in Article I, Section 8 of the U.S. Constitution, as well as the Congressional command of the Arsenal Statute, 10 U.S.C. §§4531 and 4532.

Section 4532 provides as follows:

Factories and arsenals: manufacture at; abolition of

- (a) The Secretary of the Army shall have supplies needed for the Department of the Army made in factories or arsenals owned by the United States, so far as those factories or arsenals can make those supplies on an economical basis.
- (b) The Secretary may abolish any United States arsenal that he considers unnecessary. Aug. 10, 1956, c. 1041, 70A Stat. 254.

The said Title 10 Sections are part of a national policy of insuring control by U. S. agencies of the research, development and monitoring the production of diverse armaments and related supplies, so as to guarantee quality and fairness of price of armaments supplied to the U. S. Army, to avoid an excessive reliance on private concerns in the armament production business.

In the course of years, since 1816 when the Frankford Arsenal was established, the personnel of that facility have trained and developed highly skilled civilian employees who have effectively monitored the design and production of various armaments, all to the safety, economy and benefit of the U. S. Government.

In or about the early part of 1962, U. S. Army officials publicly announced the Army's desire to abolish all statutory authority over the Army with regard to the establishment and abolition of defense facilities. The Army has attempted to avoid the mandated Congressional control over changes in the status of Army facilities.

In the years since 1962, under the guise of Army reorganization, representatives of the U. S. Army and its defense facilities have successfully eroded the Congressionally mandated role of Army facilities, such as the Frankford Arsenal, to monitor arms production by private industry.

In its role as a monitor to control the quality, cost and timely production of armaments by private industry, the Frankford Arsenal has proven to be a restraining influence on private concerns in the armament production business, and has aided in avoiding inefficiencies, breaches of contract, delays and deficiencies in production by private industry.

The erosion of the legally mandated monitoring and supervisory role of arsenals over private industry, and the tendency to excessively rely on private interests is evidenced in part by the following:

- (a) On or about March 10, 1975, Edwin Greiner, Deputy Assistant Secretary of the Army for Installation and Supplies stated that the proposed Frankford Arsenal action was part of a plan to eliminate all arsenal production and turn it over to private industry.
- (b) Maj. Gen. Robert Fairburn, USMC (Ret.) formerly the Commander of the Philadelphia Marine Corps Activity, who was instrumental in the decision to move that facility to Albany, Ga., with the resultant loss of 1,000 jobs in Philadelphia, is presently a \$1,000 a month consultant to the City of Albany, Georgia.
- (c) Defendant Secretary of the Army, Callaway, on or about April 24, 1975, claimed he knew nothing about The Arsenal Statute nor the announced plan to abolish the Frankford Arsenal, even though he is charged by Congress in 10 U.S.C. §4532, with the responsibility of determining the necessity of any existing arsenal.
- (d) Herman R. Staudt, Under Secretary of the Army, until his resignation several weeks ago, was a vice president of Martin Marietta Corporation, a major private Army contractor, and in that capacity was personally in charge of a Martin-Marietta-Frankford Arsenal contract under which

that company was paid \$3.3 million for a product the company never produced.

- (e) The defendants and their representatives have been provided with detailed information by the City of Philadelphia indicating that the planned action will result in increased, as opposed to decreased costs to the taxpayers, and that the economic justification for the closure does not exist. In accordance with the Arsenal Statute, a showing of economic necessity by the Army is a legal precondition to the planned closure, and in the absence of such showing, the planned closure is a violation of 10 U.S.C. §4532, to the injury of the City of Philadelphia and the taxpayers.

In the threatened violation of the Arsenal Act, as set forth above, the defendants and their agents have taken, and continue to take, all necessary steps toward the accomplishment of the closure and abolition of the Frankford Arsenal. In furtherance of the alleged plans described above, the defendants and their representatives have:

(a) issued orders and directives that the Production Support and Equipment Replacement Projects at Frankford Arsenal be reviewed and phased out.

(b) issued orders and directives that procurement of materials and services by Frankford Arsenal be stopped.

(c) engaged, and are now engaging in planning the equipment designation preparatory to removal and closure of all facilities at Frankford Arsenal.

(d) engaged, and are now engaging, in preparation of notices to civilian employees of Frankford Arsenal, with regard to the termination of their employment.

(e) ordered teams of representatives from within The Department of the Army to visit Frankford Arsenal in order to implement the reduction and transfer of personnel and facilities from Frankford Arsenal, preparatory to closure.

(f) formulated a specific time table for the closure of Frankford Arsenal.

(g) engaged, and are engaging, in other affirmative action in the nature of planning and preparation for the closure of Frankford Arsenal.

The defendants' conduct in closing and abolishing the Frankford Arsenal is in violation of their statutory authority as set forth by the provisions of Title 10 U.S.C. §4532.

Respectfully submitted,

Joseph R. Lally
Assistant City Solicitor

Stephen Arinson
Chief Deputy City Solicitor

Sheldon L. Albert
City Solicitor
Attorneys for City of Philadelphia

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1090

CITY OF PHILADELPHIA AND JOSEPHINE BROWN, *Appellants*

AND

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC.,
LOCAL R3-2, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES,
EDWARD LEWANDOWSKI, VINCENT SMITH, VINCENT SABATINO,
EARL CONAWAY, EDWARD YUENGLING, HUGH PHILLIPS,
PATRICIA A. MYERS, CHARLES SIMPSON, JAMES D. MCKENNA,
RUSSELL BUTTS, NEIL MULHERN
(Intervenors in District Court)

v.

HON. DONALD H. RUMSFELD, Secretary of Defense, and
HON. MARTIN R. HOFFMANN, Secretary of the Army

D.C. Civil Action No. 75-1405

Appeal from the United States District Court for the
Eastern District of Pennsylvania

Before SEITZ, Chief Judge, ROSENN and GARTH, Circuit Judges

Argued March 22, 1976

Louis F. Hinman, III
Assistant City Solicitor

Harry Fuiman
Assistant City Solicitor

Joseph R. Lally
Deputy City Solicitor

Stephen Arinson
Chief Deputy City Solicitor

Sheldon L. Albert
City Solicitor
1560 Municipal Services Building
Philadelphia, Pa. 19107
Attorneys for Appellants

Robert E. J. Curran
United States Attorney

C. Oliver Burt, III
Assistant United States Attorney

Arnold Anderson Vickery
Assistant to the General Counsel
Office, the Secretary of the Army

Robert Alan Garrett
Assistant to the General Counsel
Office, the Secretary of the Army
Attorneys for Appellees

Opinion of the Court

Per Curiam:

By this action, the City of Philadelphia and individual plaintiffs and intervenors seek to enjoin the closing of the Frankford Arsenal. The district court dismissed the action

for lack of jurisdiction and failure to state a cause of action. For the reasons stated hereinafter, we affirm.

On November 22, 1974, the Secretary of Defense announced 111 separate base closure/realignment actions, among which was the phased closure of the Frankford Arsenal. The research and development work of the Arsenal will be transferred to other United States owned facilities. The production work currently performed by the Arsenal will be partly transferred to other Government facilities and partly contracted to private industry. Closure of the Arsenal will result in the loss of approximately 3,500 jobs with an annual payroll of about 56 million dollars to the Philadelphia area. Thus, the Department of the Army seeks to realize 24 million dollars savings per year.

The City of Philadelphia brought this suit *parens patriae* alleging loss of taxes as a result of the closing.¹ Individual plaintiff Josephine Brown is a civilian employee of the Arsenal. Several individuals and the National Association of Government Employees have intervened.

1. We have grave reservations that a *parens patriae* suit may be maintained by a state, much less a city, against the federal government or one of its agencies. See *Commonwealth of Pennsylvania v. Kleppe*, No. 74-1960 (D.C. Cir. March 4, 1976), noted in U.S.L.W. 2455 (1976):

The general supremacy of federal law gives some reason to conclude that the federal *parens patriae* power should not as a rule be subject to the intervention of states seeking to represent the same interests of the same citizens. In the terms of the *parens patriae* cases, the state can not have a quasi-sovereign interest because the matter falls within the sovereignty of the Federal Government. . . .

As a result of this federalism interest, which reduces most basically to the avoidance of state interference with the exercise of federal powers, the cases evidence an extreme reluctance to recognize state *parens patriae* standing against a federal defendant. There is some basis for reading the preponderance of case law as flatly prohibiting such actions.

The complaint is in two counts, the first of which alleges that the closing of the Arsenal will have a racially discriminatory impact in violation of Executive Order No. 11478 and 42 U.S.C. §2000e-16 (Supp. II 1972). The count alleges that most of the work of the Arsenal is being transferred to Government facilities at Rock Island, Illinois; that Philadelphia has a minority population of 18 percent, while the percentage of minority group members in the Rock Island population is 3.7 percent; and that present minority employment at Frankford Arsenal is 17 percent of total Arsenal employees, while present minority employment at the Rock Island facility is 6 percent of the total employees there. The complaint states that if the closure goes forward, many of the Arsenal's current minority employees will be subjected to "a prolonged period of unemployment."

Count II is based on Article I, Section 8 of the Constitution^{1A} and on the Arsenal Act, 10 U.S.C. §§4531, 4532 (1970).² Plaintiffs' argument is that the use of "shall" in subsection (a) of §4532 and the use of "may" in subsection (b) of that provision is a difference with significance: the Secretary shall have supplies made at an arsenal, must operate them so long as they operate on an economical basis, and may close an arsenal only if he can establish that it cannot be operated on an economical basis.

1A. United States Constitution, Article I, Section 8 lists the powers of Congress. Plaintiffs do not specify upon which of the enumerated powers they rely.

2. Plaintiffs' argument is based principally upon 10 U.S.C. §4532, which provides:

Factories and Arsenals: manufacture at; abolition of.

(a) The Secretary of the Army shall have supplies needed for the Department of the Army made in factories or arsenals owned by the United States, so far as those factories or arsenals can make those supplies on an economical basis.

(b) The Secretary may abolish any United States arsenal that he considers unnecessary.

The Government raises several defenses against these claims, including lack of jurisdiction, failure to state a cause of action, sovereign immunity, lack of standing, and failure to exhaust administrative remedies prescribed by 42 U.S.C. §2000e-16. The Government's arguments have merit, but we need treat only two to sustain the action of the district court.

First, we deem plaintiffs' allegations in Count I of racial discrimination in violation of 42 U.S.C. §2000(e) to be "so attenuated and unsubstantial as to be absolutely devoid of merit," *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579 (1904), quoted in *Baker v. Carr*, 369 U.S. 186, 199 (1962), and thus federal jurisdiction under 28 U.S.C. §1331 (1970) is not established.³ The closing of the Arsenal will deprive a group of persons, 82 percent of whom are white and 18 percent of whom are minority group members, of their jobs. It is patently frivolous to claim that an action uniformly affecting all members of an overwhelmingly white group is racially discriminatory. To adopt plaintiffs' argument would bar the Government from transferring activities whenever the transfer would adversely affect any minority employees. Effectively, plaintiffs' argument would prevent the transfer of Government functions from one locale to another. Such a claim is "obviously without merit." *Ex parte Poresky*, 290 U.S. 30, 32 (1933).⁴

3. We also note that plaintiffs failed to allege the requisite jurisdictional amount.

4. The only other jurisdictional provision invoked by plaintiffs is 28 U.S.C. §1361 (1970), which provides for district court jurisdiction in cases "in the nature of mandamus to compel any officer . . . of the United States . . . to perform a duty owed to the plaintiff." While Government officers have a duty not to act in a racially discriminatory manner, the allegations of the complaint neither support mandamus relief nor establish discriminatory action.

Second, we hold that Count II of plaintiffs' complaint fails to state a cause of action because there is no implied private right of action to enforce the essentially regulatory provisions of the Arsenal Act.⁵ That result follows from *Cort v. Ash*, 422 U.S. 66 (1975).⁶

Accordingly, the order of the district court dismissing the action will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

/S/

Circuit Judge

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 76-1090

CITY OF PHILADELPHIA AND JOSEPHINE BROWN, *Appellants*

AND

**NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC.,
LOCAL R3-2, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES,
EDWARD LEWANDOWSKI, VINCENT SMITH, VINCENT SABATINO,
EARL CONAWAY, EDWARD YUENGLING, HUGH PHILLIPS,
PATRICIA A. MYERS, CHARLES SIMPSON, JAMES D. MCKENNA,
RUSSEL BUTTS, NEIL MULHERN
(Intervenors in D.C.)**

v.

**HON. DONALD H. RUMSFELD, Sec. of Defense and
HON. MARTIN R. HOFFMANN, Sec. of the Army**

(D.C. Civil Action No. 75-1405)

**On Appeal From the United States District Court
for the Eastern District of Pennsylvania**

**Present: Seitz, Chief Judge and Rosenn and Garth, *Circuit
Judges***

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

5. The complaint appears also to allege a cause of action under Article I, Section 8 of the Constitution, but does not specify upon which of the Congressional powers enumerated in Section 8 it places reliance. Plaintiffs' brief makes no argument based on that Constitutional provision. While we doubt that a private cause of action can be implied from any provision of Article I, Section 8, *see Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), we believe that in any event the actions challenged herein do not exceed Congress' powers or the powers that Congress properly delegated to the Secretary.

6. Judge Garth would not reach or decide this question but would dismiss Count II on the ground that the City of Philadelphia had no standing to sue as *parens patriae*. *See* note 1.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered November 4, 1975, be, and the same is hereby affirmed. Costs taxed against appellants.

Attest:

/s/

THOMAS F. QUINN

Clerk

April 15, 1976

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CITY OF PHILADELPHIA
AND
JOSEPHINE BROWN

v.

JAMES R. SCHLESINGER,
Secretary of Defense, et al

AND

HOWARD H. CALLAWAY
Secretary of the Army

Civil Action

No. 75-1405

Memorandum and Order

Newcomer, J.

November 4, 1975

We have before us a motion by defendant to dismiss plaintiff's claim, or in the alternative for summary judgment. For the reasons set forth below, we have determined that we must grant defendant's motion to dismiss.

Plaintiffs instituted this suit to enjoin the United States Government's closing of the Frankford Arsenal ("Arsenal"), one of 111 base closure/realignment actions announced by the Secretary of Defense on November 22, 1974. Plaintiffs claim the proposed closing violates the Arsenal Statute, 10 U.S.C. §4532 (1970), Executive Order 11478, 42 U.S.C. §2000e (1972) Supp. II), and clauses, 1, 12, 14, and 17 of Article I, Sec. 8 of the United States Constitution.

After consideration of the briefs and oral arguments of all parties, we believe we must grant defendant's motion to dismiss for lack of jurisdiction.

First, plaintiffs have no cause of action under the two statutes, the executive order, or the Constitutional provisions which plaintiff invoke.

As to 10 U.S.C. Sec. 4532,¹ we find not only no cause of action set forth therein, but also no violation of any of the provisions of that statute in defendants' decision to close the Arsenal. Subsection (b) of Sec. 4532 unequivocally states that the Secretary of the Army has it within his subjective discretion to determine whether to close an arsenal, exactly the type of decision which defendants have made in this case.

Plaintiffs contend that subject (a) of Sec. 4532 obligates the Secretary to make a determination of relative costs before he contracts to have supplies made by private contractors rather than Government arsenals. Plaintiffs then argue that the same obligation to make a relative cost determination implicitly exists under subsection (b) for any decision by the Secretary to close an arsenal. Finally, plaintiffs conclude that Sec. 4532 empowers a court to review the cost determination made by the Secretary in any proposed arsenal closing under subsection (b).

We fail to agree with this argument. To begin with, subsections (a) and (b) of Sec. 4532 deal with different matters. The Secretary of the Army may close a particular arsenal without deciding to contract for supplies from private sources. He may instead simply obtain the necessary supplies from arsenals or government operations that continue in existence.

1. The Arsenal Act, 10 U.S.C. Sec. 4532 reads:

"Factories and Arsenals: manufacture at; abolition of

(a) The Secretary of the Army shall have supplies needed for the Department of the Army made in factories or arsenals owned by the United States, so far as those factories or arsenals can make those supplies on an economical basis.

(b) The Secretary may abolish any United States Arsenal that he considers unnecessary. Aug. 10, 1956, 70A Stat. 254."

As to the provisions of the two subsections of Sec. 4532, we do not read the obligations set for the Secretary in subsection (a) to apply as well to the subject matter of subsection (b), which contains no hint of any limit on the Secretary's authority in the sphere to which subsection (b) applies. We see no reason whatsoever to take a statute which expressly and unequivocally confers the power to close an arsenal upon the Secretary of Defense, and construe it to place review of the Secretary's decision in the courts, thus in effect limiting the authority which the statute in terms gives to the Secretary.

With respect to 42 U.S.C. Sec. 2000e-16, plaintiffs have no cause of action because we believe that the complete closure of a military arsenal does not constitute a "personnel action" within the terms of that statute.² We believe that a "personnel action" under the terms of that statute refers to an action affecting employees in a functioning installation. We so conclude because to conclude otherwise would interpret 42 U.S.C. Sec. 2000e-16 so as to qualify the unqualified authority which Congress gave the Secretary of the Army in 10 U.S.C. Sec. 4532. We find no evidence that Congress intended such qualification when

2. §2000e-16(a) reads:

"All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies (other than the General Accounting Office) as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

it enacted 42 U.S.C. Sec. 2000e-16; indeed, this statute does not even refer to Sec. 4532.

We reach a similar conclusion as to Executive Order 11478.³ While this Order does establish certain obligations for federal agencies, the violation of which obligations a private party may assert as a cause of action, 42 U.S.C. §2000e-16(c), we do not believe a decision by the Secretary of the Army to close an arsenal, pursuant to his clear authority under 10 U.S.C. §4532, can constitute a violation of Executive Order 11478, whatever the black percentage of the work force at the arsenal in question. Order 11478 obligates an agency head to observe the Government's policy of equal employment opportunity, and to maintain an affirmative program to further this policy. We do not

3. Executive Order 11478 reads:

Section 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

Section 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner.

Section 6. This Order applies (a) to military departments as defined in section 102 of title 5, United States Code, 5 U.S.C.A. §102.

see that a decision entirely to close a military operation violates such provisions. If we had any doubt on this interpretation of Order 11478, we would reach the same conclusion in order to avoid limiting or qualifying the power given the Secretary of the Army under 10 U.S.C. §4532, especially since nothing about Order 11478 suggests in any way that it was meant to have a limiting effect on §4532.

Finally, plaintiffs have no cause of action under any of the constitutional provisions they invoke. The action of defendants which plaintiffs challenge does not even arguably come close to transgressing the constitutional provisions which plaintiffs cite.⁴

Nor do we have jurisdiction under any of the other grounds which plaintiffs invoke. The Administrative Procedure Act ("APA") grants us no jurisdiction since 45 U.S.C. §4532(b) clearly commits the decision to close the arsenal to the discretion of the Secretary of the Army, and the APA, whether or not it is a jurisdictional statute at all,⁵ does not permit judicial review of agency action "committed to agency discretion by law." 5 U.S.C. §701 (a)(2) (1970).

Plaintiffs argue that the APA nonetheless permits ju-

4. Plaintiffs invoke Article I Sec. 8,

cl. 1: "The Congress shall have power to . . . provide for the common defense . . . ,

cl. 12: "To raise and support armies . . . ,

cl. 14: "To make Rules for the Government and Regulation of the land and naval forces;

cl. 17: ". . . and to exercise like authority over all Places purchased by the Consent of the Legislature of the state in which the same shall be, for the Erection of Forts, Magazines, Arsenals"

5. See *Richardson v. U. S.*, 465 F.2d 844, 849, n.2 (3d Cir. 1972) (en banc), rev'd on other grounds 418 U.S. 166 (1974); but see *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Borough of Morrisville v. Delaware River Basin Commission*; 382 F.Supp. 543 (E.D. Pa. 1974).

dicial review of action committed to agency discretion for abuse of discretion. In support of this position, plaintiffs cite *American Federation of Government Employees, Local 1858, et al. v. Calloway*, (Civil Action 75-G-0652-NE, N.D. Ala., June 18, 1975), a copy of which plaintiffs furnished the Court at oral argument.

We disagree with plaintiffs argument, and find no support for it in the above-cited authority, in which the Court at page 16 of its opinion expressly said that it had jurisdiction under the APA to review the governmental agency action in question because the agency had no discretion in that action, but instead had to follow "quite specific" instructions which plaintiffs claimed the defendants in that case had violated. This decision thus in no way conflicts with our holding that the APA does not permit review of action which a Congressional statute⁶ expressly authorizes the Secretary of Army to take according to his subjective determination.

Similarly, we have no jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §§2201-02 (1970), because this Act is not a jurisdictional statute. *Schilling v. Rogers*, 363 U.S. 666, 677 (1960).

Nor do we have jurisdiction under 28 U.S.C. §1331 since, as we noted above, we have no cause of action in this case under the Constitution or any federal statute, and an action does not come within §1331 unless a right or immunity created by the Constitution or laws of the United States is an essential part of the plaintiff's claim. *Gully v. First National Bank in Meridian*, 299 U.S. 109, 112 (1936).

In like fashion, we have no jurisdiction under the Federal Mandamus Act, 28 U.S.C. §1361, since we have

6. 10 U.S.C. §4532 (b), which reads, as noted above,

"the Secretary may abolish any United States Arsenal that he considers unnecessary. (emphasis added)

in this case no clearly ministerial duty which defendants owe to plaintiffs.

Finally, because we find no cause of action or jurisdiction for this case in the statutes or Executive Order which plaintiffs invoke, we accordingly find that the United States has not consented to this suit, in which case the suit is barred by the principle of sovereign immunity. Although plaintiffs have filed this action against the individual personal defendants in their capacities as Secretaries respectively of Defense and the Army, an action is nonetheless considered to be against the sovereign "if the effect of the judgment would be to restrain the Government from acting or compel it to act." *Dugan v. Rank*, 372 U.S. 609, 620-23 (1963), in which the Court held that sovereign immunity barred a suit to enjoin officers of the Bureau of Reclamation from impounding water behind Friant Dam in California. The instant case, in which plaintiffs seek to prevent the United States from closing the Arsenal, thus constitutes a suit against the sovereign.

The doctrine of sovereign immunity will not bar a suit against the sovereign if the suit alleges either that the challenged action is not within the authorized powers of the officer in question, or that the action, even if statutorily authorized, is nonetheless constitutionally void. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Malone v. Bowdoin*, 369 U.S. 643; *Dugan v. Rank*, 372 U.S. 609 (1963). In the instant case, however, plaintiffs allege neither of these grounds, and contend only that defendants, while statutorily and constitutionally authorized to close a military arsenal, have erred in their determination to make this particular closing. Unlike the allegations that an official's action is constitutionally void or ultra vires, an allegation as in this case of mere official error in the application of valid powers does not remove the bar of sovereign immunity from a suit against the sovereign. *Larson, Malone, Dugan, supra*.

Accordingly, because we find for the above reasons that we have no jurisdiction to hear this case, we shall today enter an order dismissing plaintiffs' complaint.⁷

/s/

Clarence C. Newcomer, J.

(Caption Omitted in Printing)

ORDER

AND Now, to wit, this 4th day of November, 1975, it is hereby Ordered that defendants' motion to dismiss plaintiffs' complaint is GRANTED, and plaintiffs' complaint against defendants is DISMISSED in its entirety.

AND IT IS SO ORDERED.

/s/

Clarence C. Newcomer, J.

7. Because we believe that lack of jurisdiction clearly warrants dismissal of plaintiffs' complaint, we reach no decision on the issue of plaintiffs' standing to bring this suit, or plaintiff Brown's failure to exhaust administrative remedies.